No. 07-760

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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

TEMPLE BNAI SHALOM OF GREAT NECK,
a Corporation Organized under the New York
Religious Corporation Law,

Petitioner,

v.

VILLAGE OF GREAT NECK ESTATES and
FLORENCE RISMAN, COUNTY CLERK OF
NASSAU COUNTY and STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENT VILLAGE OF GREAT NECK ESTATES

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is a petition for certiorari timely under Rule 13 and 28 U.S.C. § 2101 when it is filed more than 90 days after entry of an order by New York's highest appellate court denying discretionary review, but is filed within 90 days after the same Court denies a motion for reargument of the order denying discretionary review?

2. Has the petitioner presented compelling reasons for obtaining review of an appellate court decision which considered and rejected a due process claim under *Jones v. Flowers*, where the evidence before it raised a "strong inference that the intended recipients [of a notice to redeem] were 'attempting to avoid notice by ignoring the certified mailings'"?

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STATEMENT OF THE CASE

The subject petition arises from an action to cancel a Treasurer's tax deed issued by the Village of Great Neck Estates (Village) to respondent Florence Risman (Risman) for property located at 68 Clover Drive in the Village.

The former owner of the property, Ona Guthartz, failed to pay Village property taxes when due, and a tax lien was sold to Risman. Thereafter, Ona Guthartz sold the property to Temple Bnai Shalom of Great Neck (Temple), an entity created by her husband, Alan Guthartz, for the apparent purpose of trying to obtain tax exempt status for the property.

Within the statutory period permitting her to do so, Risman mailed notices to redeem the tax lien to the Temple and to both Alan and Ona Guthartz. The notice to the Temple was sent to the address designated by it [PO Box 495, Great Neck NY], but the Temple failed to claim the notice from the post office and it was returned "unclaimed". Risman's notices to Alan and Ona Guthartz were mailed directly to 68 Clover Drive. They, too, were not claimed.

Upon the expiration of the statutory redemption period, and upon proof of Risman's compliance with the applicable statutory procedures, the Village issued a Treasurer's tax deed to Risman. Risman then commenced an action to validate that deed.

The Temple thereupon commenced an action to set aside the deed to Risman, claiming, *inter alia*, that the

Village's 1996-1997 tax lien sale was constitutionally defective on the ground that the prior owner, Ona Guthartz, had not been given proper notice of that lien sale.

After considerable litigation, several amendments of the complaint, and after dismissal of a bankruptcy proceeding found to have been filed by the Temple in bad faith, the Supreme Court of the State of New York concluded that the Temple did not have standing to raise the claim that Ona Guthartz had not received proper notice of the tax lien sale. The court also denied the Temple's motion to add Ona Guthartz as a party plaintiff, and determined in various Orders that (a) the tax lien sale had been proper, (b) the Village and Risman had followed proper procedures in enforcing that lien and in issuing the tax deed, (c) the claims against the Village were without merit, and (d) Risman was the proper owner of the title to the property.

The Temple appealed from various Orders adverse to it. Insofar as is relevant to this petition, the appeal included a claim that Risman's "failure to provide the Temple with actual notice of the right to redeem the tax lien" denied it due process. The Appellate Division, Second Department, rejected the contention.

In the Appellate Division's view, *Jones v. Flowers* was "factually inapposite" since the mailings "were sent to the various potential recipients at their current and correct addresses, and were returned unclaimed only after repeated attempts at delivery were made." The court added:

> [T]here is no suggestion in this record that any of the potential recipients was not at home or was otherwise legitimately unavailable to sign for the mailing. Accordingly, considering the 'unique information about [the] intended recipient[s]' [*Jones, supra*] (__ US __, 126 S Ct at 1716) which can be gleaned from the history of this matter, and taking 'into account the status and conduct of the owner in determining whether notice was reasonable' (*Kennedy v Mossafa*, [100 NY2d 1] at 11), the defendants could reasonably draw the strong inference that the intended recipients simply were 'attempting to avoid notice by ignoring the certified mailings' (*Matter of Harner v County of Tioga*, [5 NY3d 136] at 141; *see Matter of County of Clinton [Bouchard]*, 29 AD3d 79 [2006]), and that attempts at alternative methods of giving notice were unnecessary and would prove futile.

The Temple responded to the decision by first moving in the Appellate Division for leave to appeal to the Court of Appeals (as permitted by CPLR 5602). By order dated November 16, 2006, the Appellate Division denied the motion. The following month, the Temple timely moved in the Court of Appeals for leave to appeal. It claimed, as it had claimed on its earlier motion, that leave should be granted "to address the application of *Jones v. Flowers* to this case". The Village responded by distinguishing *Jones* and contending "if movant did not receive notice from Risman . . . that was the sole fault of movant, who refused to accept those notices

even though they were sent to the correct address." The opposition added:

> unlike the situation in *Jones*, where the mailings were sent to an incorrect address and no attempt was made to ascertain a correct one, the mailings here were sent to the correct address, as well as another address for Alan Guthartz, but the certified mail notice was returned 'unclaimed'. It should be clear that movant willfully sought to avoid notice, and now seeks relief based on its own willful acts. Risman and the Village have met all of their due process obligations; no research on the part of either of them would have disclosed any other address to which notice should be sent to movant as more likely to give it notice.

By order dated and entered May 3, 2007, the Court of Appeals denied the Temple's motion for leave to appeal. Notice of entry of the latter order was duly served upon the Temple's attorneys on May 9, 2007. Thereafter, the Temple's attorneys took the unusual step of moving for reargument of the order denying its motion for leave to appeal. By order dated September 6, 2007, the latter motion also was denied.

The instant petition was filed on December 5, 2007 — more than 7 months after entry of the Court of Appeals' May 3, 2007 order denying the Temple's as of right motion for leave to appeal. However, the petition does not include a copy of the Court of Appeals' May 3, 2007 order. Rather, it reprints only the Court's later order, dated September 6, 2007, denying the Temple's motion for reargument of the order denying its motion for leave to appeal.

REASONS FOR DENYING THE PETITION

I. The Petition is Untimely Under Rule 13.1

The only issue that warrants this Court's close attention is the timeliness of the petition. Rule 13.1 unambiguously provides that a petition "seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort" must be filed "within 90 days after entry of the order denying discretionary review." Since the subject petition was not filed within 90 days of the date when the Clerk of the New York Court of Appeals entered that Court's order denying petitioner's application for discretionary review (May 3, 2007), the petition is untimely as a matter of law, and this Court must dismiss it. *See Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

We anticipate that petitioner may argue in reply that the petition is timely under Rule 13.3. Such a contention would be meritless.

In pertinent part, Rule 13.3 provides "if a petition for rehearing is timely filed in the lower court by any party, . . . the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of rehearing . . ." This Court's precedents make plain that the intent of Rule 13.3 is to extend a party's time to petition for certiorari in cases where "[a] timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Missouri v. Jenkins*, *supra*, 495 U.S. at 46, quoting *Dept. of Banking of Nebraska v. Pink*, 317 U.S. 264, 266 (1942).

That rationale has no applicability here. Petitioner's motion to reargue the denial of its application for leave to appeal did *not* suspend the finality of the lower court orders that were the subject of the May 3, 2007 order denying leave. To the contrary, in the absence of a stay pursuant to the provisions of section 5519 of New York's Civil Practice Law and Rules (CPLR), the lower court's orders remained in full effect.

Accordingly, petitioner's motion for reargument of its motion for leave to appeal did *not* extend the time for petitioning, pursuant to Rule 13.3. Consequently, the petition is untimely under Rule 13.1 and 28 U.S.C. § 2101(c), and must therefore be dismissed.

II. The Courts of New York have Not Rejected Or Failed to Apply the Rule Established in *Jones v. Flowers*

Turning to the petition, it presents a question that proceeds from a false premise. The courts of New York have not "refused to apply the rule of law established in *Jones v. Flowers*." Rather, under circumstances quite different from those presented in *Jones*, the New York courts have applied a common sense exception where it appears that a party has been attempting to *avoid* a required notice.

This Court's decision in *Jones*, of course, ultimately rests upon the shoulders of *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950), where the Court announced that the means employed for giving notice "must be such as one desirous of actually informing the [intended recipient] might reasonably adopt to accomplish it."

Id. at 315; *see also Mennonite Bd of Missions v. Adams*, 462 U.S. 791, 800 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party"). Over the years, the New York courts have been faithful to the due process principles which logically follow from this Court's decision in *Mullane* and its progeny. *E.g. McCann v. Scaduto*, 71 N.Y.2d 164 (1987) (applying *Mennonite* to invalidate tax lien sale). And they have been equally faithful in applying *Jones* in appropriate cases involving claims of lack of actual notice. E.g. *89 Pine Hollow Road Realty Corp. v. American Tax Fund*, 41 A.D.3d 771 (2d Dept. 2007) (applying *Jones* to require hearing on due process grounds where notice to redeem was returned unopened).

Indeed, even before *Jones*, the New York court decisions recognized the general rule that due process may require additional efforts in cases involving undelivered mail. As this Court's opinion in *Jones* confirms, the New York court holdings prior to *Jones* directly foreshadowed the due process rule that the majority ultimately endorsed. *See Kennedy v. Mossafa*, 100 N.Y.2d 1, 9 (2003), quoted in *Jones*, *supra* ("[w]e reject the view that the enforcing officer's obligation is always satisfied by sending the Notice to the address listed in the tax roll, even where the notice is returned undeliverable"). Thus, under the pre-*Jones* due process precedents of New York, and the similar precedents of many of its sister states and the rulings of most federal courts of appeal, a majority of courts across the nation followed the well-settled general rule that "when the

government learns [that] its attempt at notice has failed, due process requires the government to do something more before property is sold at a tax sale." *Jones*, *supra*, citing cases.

At the same time, however, the New York decisions, like the decision in *Jones*, have applied a fact-sensitive test that ultimately turns on the unique facts and circumstances presented to the court. In each particular case, the task of the court is to determine, under the logic of *Mullane*, whether particular efforts to give notice were reasonable calculated to succeed. As explained in *Matter of Harner v. County of Tioga*, 5 N.Y.3d 136, 141 (2005), "[d]ue process is a flexible concept, requiring a case-by-case analysis that measures the reasonableness of a municipality's actions in seeking to provide adequate notice."

We do not see anything in *Jones* which contravenes the notion that due-process-notice cases require such a "case-by-case analysis." Nor do we read *Jones* as addressing a set of facts where the intended recipient appears to have been *avoiding* a required notice. On the latter issue, the applicable precedents apply an equally well-settled rule: the effect of a written notice "cannot be avoided by refusing service of that notice." *Reliance Ins. Co. v. Mast Const. Co.*, 159 F.3d 1311, 1318 (10th Cir. 1998); *accord Committee on Grievances v. Feinman*, 239 F.3d 498, 499 (2d Cir. 2001) ("a party's constitutional right to receive actual notice of certain claims against him is not violated when he himself intentionally and successfully thwarted service of the very notice he claims not to have received").

Accordingly, it is not surprising that the courts of New York have refused to allow a party to avoid or refuse notice, and then to claim lack of notice as a defense. As the petition notes, the New York courts have typically rejected due-process-notice arguments in cases where there was proof that the intended recipient "was attempting to avoid notice by ignoring the certified mailings." *Matter of Harner, supra*; *see also Matter of County of Clinton v. Bouchard*, 29 A.D.3d 79 (3d Dept. 2006). But these decisions do not suggest a wholesale rejection by the New York courts of the rule of law established in *Jones*. Indeed, in the course of applying a "case-by-case analysis" to an argument based on *Jones*, at least one appellate court in New York has directed a hearing to determine whether, consistent with *Jones*, due process notice was properly given under the circumstances presented. E.g. *89 Pine Hollow Realty Corp., supra*.

As decisions such as *Luessenhop v Clinton County*, 466 F.3d 259 (2d Cir. 2006), teach, the state and federal courts sometimes have struggled with the application of *Jones* to a nearly infinite variety of factual and procedural scenarios. But there is no groundswell of opposition to *Jones* among the Judges on the New York state court bench. There is certainly no showing, through the cases cited in the petition, that the courts of New York have "refused" to apply *Jones* as this Court intended.

In the final analysis, the subject petition simply voices its disagreement with the result reached by the Appellate Division through a manufactured "conflict" between the New York court decisions and the precedent

announced by this Court in *Jones*. Since *Jones* did not involve circumstances suggesting an attempt to avoid service, the New York Court's decision to distinguish *Jones* on that ground cannot be viewed as a "refusal" to acknowledge this Court's authority as the final arbiter of a party's due process rights. And given petitioner's utter failure to contradict or dispute the accusation that it "willfully sought to avoid service," it hardly is in a position to hide behind the due process clause as part of a last ditch effort to contest a municipality's tax enforcement procedures. Since the procedures that were employed, in fact, provided a reasonable means of giving petitioner notice, and since the New York court found that petitioner, itself, was attempting to avoid service, this is not a suitable case for expanding on the guarantees announced in *Jones*.

CONCLUSION

For the foregoing reasons, the petition should be dismissed as untimely. Alternatively, the petition should be denied.

Respectfully submitted,

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